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NO. 87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

THE PUBLIC UTILITIES COMMISSION OF OHIO, GEORGE McCONNAUGHEY, CHAIRMAN OF SAID COMMISSION, ET AL., *Appellants*,

vs.

UNITED FUEL GAS COMPANY ET AL., *Appellees*.

BRIEF FOR APPELLEE UNITED FUEL GAS COMPANY.

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INDEX

Subject Index

Table of Cases Cited

STATUTES CITED

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BRIEF FOR APPELLEE UNITED FUEL GAS COMPANY

This suit was instituted by the appellee United Fuel Gas Company in the District Court of the United States for the Southern District of Ohio for the purpose of having a determination and declaration of the rights of the parties arising under a contract between the said United Fuel Gas Company and the Portsmouth Gas Company for the sale of natural gas to the latter Company by the former, at the City of Portsmouth, Ohio, and to have the appellant Commission enjoined from determining what price the said United Fuel Gas Company should charge for said natural gas. The court below, after a full hearing, determined that the appellant Public Utilitier Com-

mission of Ohio had no jurisdiction over the subject-matter involved and enjoined it from further proceeding against this appellee.

STATEMENT OF THE CASE.

United Fuel Gas Company is a corporation engaged in the business of producing, buying, transporting and selling natural gas, both to retail consumers and to other companies engaged in distributing it to such consumers. The Portsmouth Gas Company is engaged in the business of distributing natural gas to domestic and industrial consumers in the City of Portsmouth, Ohio. There is no connection, either by way of interlocking directors or unity of interest, between the said United Fuel Gas Company and the said Portsmouth Gas Company, nor is there any such relation between any associate or affiliate of any of said companies (R. p. 38).

On the 22nd day of October, 1931, a contract was entered into between the said United Fuel Gas Company and the Portsmouth Gas Company, by which the former Company agreed to sell and did sell to the latter Company a supply of natural gas for its requirements (R. pp. 12-16). This contract, by its terms, was to continue in force for the term of five years, but before the expiration of said time, the same was continued by agreement of the parties, from time to time, the last of said extensions being on the 26th day of October, 1938 (R. p. 50), by which said contract was continued in force for one year from November 1st of that year, or until a new contract was concluded: Under the terms of this contract and extensions thereof this appellee has been furnishing natural gas to the said Portsmouth Gas Company and is still doing so.

On the 24th day of February, 1932, the Council for the City of Portsmouth passed an ordinance fixing the rate at which the said Portsmouth Gas Company should sell

gas to its consumers in said city (R. pp. 17-18). From this ordinance the said Portsmouth Gas Company appealed to the Public Utilities Commission of Ohio, asserting that the rate fixed by the said City of Portsmouth was unreasonable and confiscatory, and under the provisions of the laws of the State of Ohio, gave bond and elected to charge the rate then in force, pending the determination of said appeal (R. p. 18).

Upon this appeal the said City of Portsmouth filed a petition in which it contended that the rates charged to consumers in the City of Portsmouth were unreasonable and excessive, and that the reason therefor was because the rate charged to the Portsmouth Gas Company by the United Fuel Gas Company was excessive, and moved the Commission to make the said United Fuel Gas Company a party to the proceeding and determine what would be a proper rate to be charged by the said United Fuel Gas Company to the Portsmouth Gas Company for the gas furnished by it (R. pp. 17-22). The said Public Utilities Commission thereupon summoned the said United Fuel Gas Compnay to show cause why it should not be made a party to the proceeding and such action taken therein as was prayed for in the petition of the said City of Portsmouth. In response to this order this appellee made answer and denied that the said Public Utilities Commission had any jurisdiction of the matters involved or any power to regulate the rates between the said Portsmouth Gas Company and this appellee, and asked that it be dismissed from said proceeding (R. pp. 22-27). This matter was heard before the Commission, and resulted in the Commission entering an order denying the motion to dismiss this appellee from said proceeding and making it a party thereto (R. pp. 27-29).

The said Public Utilities Commission thereupon proceeded to hear the case presented, and found that the rates being charged by the said Portsmouth Gas Com-

pany were not unreasonable and that the rate fixed by the City of Portsmouth in its ordinance was unreasonable and confiscatory, if the price paid for gas by the said Portsmouth Gas Company to this appellee was a proper price, and determined that it could not finally decide what would be a proper rate until it had fixed a rate between the said Portsmouth Gas Company and this appellee, and required this appellee to forthwith proceed to produce before it all pertinent and porper evidence to show what would be a proper rate to be charged by it to the said Portsmouth Gas Company (R. pp. 30-35).

Thereupon this appellee tendered a petition for rehearing, in which it again asserted that the said Public Utilities Commission of Ohio had no jurisdiction over the transaction between it and the said Portsmouth Gas Company. In this petition it asked said Commission to specifically declare that it (the said Commission) has or has not the power to regulate the price and that it intends to or does not intend to regulate the price and fix the same, and that it has or has not the right to compel this petitioner to continue to furnish gas to the Portsmouth Gas Company at such rate as may be fixed by the said Public Utilities Commission of Ohio, and that it intends to compel this petitioner to furnish such gas at such rate as it may prescribe, or that it does not intend to do so (R. pp. 35-37).

In answer to this petition for rehearing the said Commission entered an order (R. pp. 37-39), in which it more specifically found the facts upon which its conclusions were based, and also declared that the transaction between this appellee and the Portsmouth Gas Company was a public service which it (the said Commission) had the power to regulate, and that it intended to so regulate the price charged for said natural gas.

For convenience, the specific findings of fact in said order are set out as follows:

declared that the making of rates to be charged for services rendered in interstate commerce is beyond the power of local authorities. *State of Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298; *Public Utilities Comm.* v. *Landon*, 249 U. S. 236; and particularly the case of *Public Utilities Comm. of Rhode Island* v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83. In more than one of these cases this court has declared that the fact that Congress has not acted to regulate the matters involved amounts to to a declaration on the part of the Congress of the United States that it does not intend that the same shall be regulated.

The appellants also contend that appellee sells gas to other companies at a less rate than that charged here. The examples there given are not extracted from anything in this record, nor is there anything to indicate that the conditions under which the deliveries are made to those other companies are at all similar to the conditions involved here. For instance, the appellants do not advise the court that the deliveries which they propose to compare are made at a point practically on the perimeter of the gas-producing area more than one hundred miles distant from the point of delivery in this case, nor do they indicate that the quantity of gas involved there is very substantially different from the quantity involved in this case, nor does it appear whether or not the deliveries made in the instances referred to are with more or less regularity than the deliveries involved here. Many other elements would have to appear before the comparison would be of any value. Such a comparison, to mean anything, would have to include a showing that all the conditions were substantially similar in each case.

Appellants also argue that because this appellee, in its answer before the Public Utilities Commission, stated that it did not question the right of the Commission to call upon it for any evidence which it might have available

to show what would be a proper rate to allow the Portsmouth Gas Company to charge in its rates, but it did deny the power of the Commission to compel this appellee, at great expense, to compile evidence, and it also challenged the right of the Commission to prescribe the rate at which appellee should sell gas to the Portsmouth Gas Company. Of course, it is apparent that the action of this appellee in that regard was no more than a recognition of the right of the Commission to secure any proper evidence it might desire in fixing the rates to be charged to the consumers of the City of Portsmouth. If the Portsmouth Gas Company agreed to pay a grossly excessive rate to this appellee for its supply of gas, it might be that the Commission could hold that it would not be justified in allowing it anything more than what it considered to be reasonable. In the case of *Public Utilities Comm.* v. *Landon, supra*, the point was made there that the supplying company had entered into a contract, the effect of which was to give it too little for the gas supplied. This court said that this was a matter about which the parties had a right to contract, and if they made an improvident contract, the loss must be theirs. And so in the case of *Public Utilities Comm. of Rhode Island* v. *Attleboro Steam & Elec. Co., supra*, the contention was made that the contract furnished inadequate compensation for the service rendered. This court, however, held that that was a matter which the parties had agreed on, and if they made an improvident contract, they must suffer the loss. The argument was made there that it would have the effect of throwing a burden on other consumers to make up the loss sustained through furnishing the service involved, but the court said that this did not follow, that the loss must be sustained by the stockholders of the company who were responsible for the improvident contract. And so here, even though it be considered that the contract made by the Portsmouth Gas Company with this appellee

was an improvident contract, no relief could be given by local authorities against the same, in so far as the Portsmouth Gas Company was concerned, but, under the holdings of the cases above referred to, the result of such improvidence must fall upon the stockholders of the Company. The Public Utilities Commission would have the right to fix what a fair rate for natural gas would be in the City of Portsmouth, and if this fair rate when fixed did not furnish the Portsmouth Gas Company with funds sufficient to pay for its supply of gas under the contract, then the stockholders of the Company must bear the loss thus entailed. This appellee, therefore, in its answer expressed its entire willingness to aid the Public Utilities Commission in every way it could in furnishing evidence of what a fair rate would be, without submiting itself to regulation by that Commission in regard to this transaction.

THE COURT BELOW HAD JURISDICTION AND PROPERLY EXERCISED THAT JURISDICTION IN GRANTING THE RELIEF WHICH IT DID.

Some suggestion has been made by the appellants that the court below had no jurisdiction of this case because of what is known as the "Johnson Act." (28 U. S. C. A. Sec. 41 as amended). There is a clear exception in the "Johnson Act" to the effect that where the controversy involves the regulation of interstate commerce (which is the case here), it does not apply.

The pertinent provisions of that Act are:

> "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision

thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversty of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

It will be seen that the "Johnson Act" has no application where the claim is that the order complained of is a regulation of interstate commerce, as is the case here.

This case, we submit, comes clearly within the provisions of the Declaratory Judgment Act (Title 28, USCA, 400). There is a clear controversy here between the appellants and this appellee. The appellants insist that the Public Utilities Commission of Ohio has the power to determine the price which this appellee shall charge for natural gas sold by it to the Portsmouth Gas Company, while this appellee contends that it (the Commission) has no such power. It is difficult to picture a clearer case of actual controversy. The Public Utilities Commission declares that it will proceed to determine what rate this appellee shall be allowed to charge, and make it accept that rate. As to when jurisdiction will be sustained under the Declaratory Judgment Act is fully discussed in the case of *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, and we respectfully submit that the doctrine announced in that case brings the controversy here clearly within the jurisdiction of the court.

However, aside from the Declaratory Judgment Act, the court properly exercised jurisdiction under its general equity powers. Here was an order asserting the power of the Public Utilities Commission of Ohio to fix the price

"That the gas being delivered to The Portsmouth Gas Company, and which has been delivered to it under the contract hereinbefore referred to, is produced, and has been produced during all of said time, in the States of West Virginia and Kentucky, and is conveyed, together with other gas from the same sources, through a pipe line in a continuous flow from said points of production in West Virginia and Kentucky to a point in the State of Ohio, where the same is delivered to The Portsmouth Gas Company; that out of the said pipe line said The United Fuel Gas Company also delivers certain other gas from the same sources to a distribution system supplying the town of New Boston, in the State of Ohio, and the City of Ironton, in the State of Ohio, and that the distribution of natural gas in said town of New Boston and the said City of Ironton, aforesaid, is made to the inhabitants of the said municipalities by said The United Fuel Gas Company through a distribution system owned by said The United Fuel Gas Company; and

"That The United Fuel Gas Company and The Portsmouth Gas Company have no connection with each other by way of interlocking directors or unity of interest; neither has any associate, affiliate or parent company of either of said companies, The United Fuel Gas Company and The Portsmouth Gas Company, and such relation, but the two companies are entirely separate and distinct from each other and are so operated."

The declaration of the Commission and its judgment as to the right to regulate the said rate, as contained in said order, is also for convenience set out as follows:

"The Commssion further finds that the furnishing of natural gas by the United Fuel Gas Company to

The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, *General Code* of Ohio; that the rates to be charged threfor are subject to the jurisdiction of this Commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this Commission."

After making these more specific declarations, said Commission denied this appellee's petition for rehearing and allowed the former order to remain in force requiring it to proceed to justify the rate being charged by it to the said Portsmouth Gas Company.

This appellee thereupon presented its bill to the District Court of the United States for the Southern District of Ohio, praying for a determination of its rights in the premises and that the said Public Utilities Commission be enjoined from enforcing said order against it (R. pp. 1-12). In said bill it is averred that heavy penalties are inflicted upon any public utility failnig to carry out an order of the Public Utilities Commission, and particularly that the penalty of one thousand dollars for each day's delay in carrying out said order would be inflicted, together with imprisonment, and that the parties charged with the execution of the law would proceed to enforce said penalties against this appellee, unless enjoined therefrom (R. pp. 9-10).

The defendants to said bill answered the same (R. pp. 41-44). In this answer every allegation of fact is admitted, but the conclusions of law arising therefrom are denied.

Before the hearing the parties entered into a stipulation that the facts found by the Public Utilities Commission of

Ohio in the order of May 29, 1935, are the facts pertinent to a consideration of the questions involved, and that a compliance with the order would cost this appellee a substantial sum of money in excess of three thousand dollars. (R. p. 44).

The case was originally heard before a three-judge statutory court, composed of Hon. Florence E. Allen, Circuit Judge, Hon. Robert R. Nevin, District Judge, and Hon. Benson W. Hough, District Judge. Before a decision was reached, Judge Hough departed this life, and it was necessary to have a second hearing of the case, which was done, the Hon. Mell G. Underwood being substituted for Judge Hough.

Pending this hearing, the "Natural Gas Act" (Title 15 USCA, Sec. 717, etc.) was passed, and an amended bill was filed calling the court's attention to this act, and also filing therewith the order of the Federal Power Commission of February 14, 1939, approving the contract between this appellee and the said Portsmouth Gas Company. Said supplemental bill is found at pages 53-56 of the record, and said order of the Federal Power Commission at page 57 thereof.

The Public Utilities Commission of Ohio, as well as the other defendants, moved to dismiss the bill (R. p. 58). this motion was overruled by an order entered July 8, 1941 (R. p. 69). The defendants then answered said bill (R. pp. 70-75), which, in effect, admits all of the facts before pleaded, but challenges the legal conclusions drawn therefrom. The court thereupon handed down its opinion (R. pp. 76-85) granting this appellee the relief prayed for, and entered judgment in accordance therewith (R. pp. 85-86).

THE NATURAL GAS INVOLVED IN THIS PROCEEDING IS INTERSTATE COMMERCE

Upon the hearing in the court below, the defendants conceded upon the record that the transportation into the State of Ohio by pipe lines of gas produced in the States of West Virginia and Kentucky is interstate commerce. See opinoin of the court below (R. p. 81). Appellants seem now to retreat from this position in their assignment of errors, and assign as error the action of the District Court in holding the transaction to be interstate commerce. It therefore becomes necessary at the outset to determine this question. It is agreed that the facts found by the Commission (R. p. 38) in regard to this matter, are the facts. This specific finding has been heretofore quoted herein. From it, it appears that the natural gas involved is produced or purchased by this appellee in the States of West Virginia or Kentuncky, or both, and is transported through a pipe line, in a continuous flow, from said points of production in the State of West Virginia and Kentucky to a point in the State of Ohio, where the same is delivered to the Portsmouth Gas Company. It is also found as a fact by said Commission that there is no connection between the United Fuel Gas Company and the Portsmouth Gas Company by way of interlocking directors or unity of interest, neither is there such connection between any associate, affiliate or parent company of either of said companies, but the two companies are entirely separate and distinct from each other and so operated. It is also a fact found by the Commission that out of this same pipe line the United Fuel Gas Company delivers gas to a distribution system owned by it in the City of Ironton, Ohio, and the village of New Boston, Ohio, from which distribution system it delivers natural gas to the inhabitants of those places. This transaction, however, has no relation whatever to the delivery of natural gas to the Portsmouth Gas Company.

It is a little difficult to understand the basis of appellants' contention that the natural gas here involved is not interstate commerce. It is produced in the States of West Virginia and Kentucky, transported through a pipe line from those States across the Ohio River into the State of Ohio, and there sold and delivered to the Portsmouth Gas Company. The decisions of this court make it quite clear that natural gas is no different from any other product in so far as the question of determining its characterization as interstate commerce, or otherwise, is concerned. In the case of *Public Utilities Commission* v. *Landon*, 249 U. S. 236, this court held:

> "That the transportation of gas through pipe lines from one state to another is interstate commerce, may not be doubted. Also, it is clear that, as part of such commerce, the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state."

The facts in that case bear an almost complete analogy to the facts here. There the complaining company produced the natural gas involved and transported it to another State, where it was delivered to a number of independent distribution companies which, in turn, received the same and delivered it in small quantities to the individual consumers. There was a contract between the producing company and these small distributing companies providing for the sale of the gas and, as compensation therefor, a percentage of the price at which the same was sold. The Utilities Commission prescribed rates at which the distributing companies should sell the gas to their consumers. The producing company in the cited case contended that the percentage of such rates to which it was entitled under the contract would not furnish it adequate compensation for the gas which it had delivered. The court held that the producing company was not con-

cerned with the rate at which the gas was sold to the consuming public, and that the Public Utilities Commission had the right to fix a just and reasonable rate for the service, based upon such information as it was able to obtain. If the producing company entered into a contract the result of which was to give it a less share of the amount received from the consumers than the value of its service would entitle it to, that was a matter that the courts had nothing to do with, but was controlled entirely by the contract of the parties, and that they being *sui juris*, it would not be disturbed. This case is a clear holding that natural gas transported under conditions exactly similar to the conditions involved here, is interstate commerce.

In *East Ohio Gas Company* v. *Tax Commission of Ohio*, 283 U. S. 465, this court again declared such a transaction as that involved here to be one in interstate commerce. It was there held that the gas ceased to be interstate commerce when it was delivered to the distributing system and broken up for delivery to the customers. In announcing the conclusion that the transaction was interstate commerce to the extent that we are interested in it here, the court, on page 470 of the opinion, says:

> "The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and then by means of appellant's high pressure transmission lines to their connection with its local system, is essentially national—not local—in character, and is interstate commerce within as well as without that state."

Likewise, in the case of *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, this court held that gas transported from one state to another was interstate commerce, and it so held in that case, notwithstanding all of the gas transported was commingled and part of it used within the state of its origin.

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553, this court likewise held that the transportation of natural gas from one state to another for sale and consumption in the latter, was interstate commerce. The question there involved was the validity of an Act of the Legislature of West Virginia prohibitng the transportation of natural gas from the state until the demands of West Virginia consumers had been first satisfied. This act was attacked by the States of Pennsylvania and Ohio, upon the ground that it imposed an unlawful restriction upon interstate commerce, and this court so held and the act was declared invalid.

The case of *State of Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, presents a complete analogy to the case we have here. In that case the Kansas Natural Gas Company was the producer of the gas. It transported it from the place of production and delivered it to distributing companies in the States of Kanasas and Missouri. The public utility commissions of these States attempted to regulate the price that it should charge for this gas to these local distributing companies, with a view of reducing the rate the distributing company should charge the consumers. This action of the commissions was resisted by the producing company, and the question of the right of the commissions to so regulate the price at which the gas should be sold to the distributing companies came to this court on appeal. It was held:

> "The transportation of gas through pipe lines from one state to another, for sale to distributing companies, is interstate commerce, so that the state authorities have no control over the rates to be charged for it, and the fact that Congress has taken no action in the matter is immaterial."

Another case in which this court distinctly held that such transactions are interstate commerce is *Peoples Natural Gas Co.* v. *Public Service Commission of Pa.*, 270 U. S. 550. In that case the Peoples Company had been selling gas to a distributing company in the City of Johnstown, Pa. It appeared that a considerable part of this gas was produced in the State of Pennsylvania, but part of it was produced in the State of West Virginia, and sold to the Peoples Company at the state line. The Peoples Company sought to discontinue this supply of gas to the Johnstown Company. The Public Service Commission of Pennsylvania denied the right to do so and sought to compel the Peoples Company to continue this supply, holding that inasmuch as the ownership of the gas transported from West Virginia was changed at the state line, it ceased to be interstate commerce, and also holding that even though the West Virginia gas might be interstate commerce, there was plenty of gas produced in the State of Pennsylvania to supply the needs of the City of Johnstown. These holdings were both approved by the Supreme Court of Pennsylvania, but upon appeal to this court, it was held that the Pennsylvania court was in error in holding that the West Virginia gas was not interstate commerce because of change of ownership at the state line, announcing the doctrine that the ownership of the commodity had nothing to do with its character as commerce, but that this depended entirely upon its movement. It held, however, that inasmuch as the Peoples Company produced very much more gas in the State of Pennsylvania than was required for supplying the demands in the particular case, the order of the Commission could not be said to interfere with interstate commerce, for the reason that these demands might be met out of the gas produced locally.

Another case involving the same question is that of *Public Utilities Commission of Rhode Island* v. *Attleboro*

Steam & Electric Co., 273 U. S. 83. The question involved there was upon a complaint filed with the Rhode Island Public Utilities Commission by the Narragansett Electric Light Company, the producer of the electricity, averring that the contract which it had with the Attleboro Company for furnishing electricity no longer gave it adequate compensation for the service rendered. All of the operations of the Narragansett Company in producing the electricity were carried on in the State of Rhode Island. The Attleboro Company was located in the State of Massachusetts, and all of the electricity used by it was conveyed to it over the wires from the point of production in Rhode Island to the point of consumption in Massachusetts. The Attleboro Company responded to this application that the contract it had with the Narragansett Company was not subject to regulation by the Public Utilities Commission of Rhode Island, for the reason that the electricity purchased by it was interstate commerce. The Narragansett Company insisted that while it was true the electricity might be interstate commerce, still if it was compelled to sell electricity under this contract to the Attlboro Company at a loss, it would have to recoup this loss from its local consumers in Rhode Island, and for that reason the Public Utilities Commission of Rhode Island would have a right to regulate this price. The Public Utilities Commission of Rhode Island sustained this contention, holding that it had a right to fix the rate to be charged for the electric current. The Supreme Court of Rhode Island, upon review, reversed this holding and held that the electricity being interstate commerce, the Commission did not have a right to regulate the price at which the same should be sold; that it did not follow that the consumers in Rhode Island would be affected by the adequacy of the rate, but that the loss, if any, that might arise therefrom must fall upon the stockholders of the company, the officers of whom had made an improvi-

dent contract. Upon appeal to this court, this view was entirely sustained, and it was held that the public authorities of Rhode Island were entirely without authority to regulate the price at which the commodity should be sold in interstate commerce.

This view is clearly reflected and emphasized in the case of *Western Distributing Co.* v. *Public Service Commission of Kansas et al.*, 285 U. S. 119. More recently this court has dealt with the same question in *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, decided March 16, 1942, 86 L. Ed. 699, and *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, decided January 5, 1942, 86 L. Ed. 322, holding that natural gas transported under substantially similar conditions to those involved here was interstate commerce.

The decisions determining when commodities become interstate commerce are numerous, but we have limited our citation to those decisions involving the same commodity that is involved in this case.

The argument seems to be that because the appellee here transports through the same pipe line through which it transports the gas to the Portsmouth Gas Company, other gas which it delivers to a distribution system owned by itself and thereafter distributes it to retail consumers, it thereby becomes amenable to the regulations of the Public Utilities Commission of Ohio as to all or any transactions which it may have. This argument is entirely untenable. It is entirely competent for the same party to engage in a business exclusively intrastate and subject to local regulation and also, at the same time, in a business interstate and not subject to such regulation. The test of whether or not it is subject to local regulation is the character of the particular business done and not the party who does it. This is clear from the decisions above cited.

This question would seem to be put at rest by the holding of this court in the case of *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. The contention was made there that inasmuch as the principal business of the Narragansett Company was local or intrastate commerce and subject to local regulation, the very small amount of the business involved in the litigation should likewise be so subject. In disposing of that contention, this court, at page 90 of the opinion, said:

> "The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character; and if the regulation places a direct burden upon its interstate business it is none the less beyond the power of the state because this may be the smaller part of its general business. Furthermore, if Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress."

THE COMMODITY HERE INVOLVED BEING INTERSTATE COMMERCE, THE PUBLIC UTILITIES COMMISSION OF OHIO HAS NO POWER TO REGULATE IT OR TO REGULATE THE DEALINGS OF PARTIES THEREIN.

What we have heretofore said would seem to demonstrate that the commodity with which we are dealing is interstate commerce, and assuming that this has been shown, has the Public Utilities Commission of Ohio any power to regulate the dealings in it, notwithstanding the fact that it is commerce between the states? The decisions of this court, we think, answer this question in the negative.

In the case of the *State of Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, this court had occasion to consider the exact question here presented. It was there contended that the matter was one requiring regulation, and that the Congress not having regulated it, the state authorities would have the right to do so. This court answers that contention, at page 308 of the opinion, in the following language:

> "The contention that, in the public interest, the business is one requiring regulation, need not be challeged. But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation."

This court also considered the power of state authorities to impose burdens on interstate commerce, regardless of whether the same had been regulated by Congress, in the *Minnesota Rate Case*, 230 U. S. 352, and, at page 396, uses the following significant language:

> "If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which, in the absence of Federal regulation, should be free. If the acts of Minnesota constitute a direct burden upon interstate commerce, they would be invalid without regard to the exercise of Federal authority touching the interstate rates said to be affected."

The same doctrine is announced, in effect, in *Public Utilities Commission* v. *Landon*, 249 U. S. 236. This court has never departed from the doctrine of these decisions. In fact, if there has been any change of attitude, the tendency is to extend the Federal jursdiction rather than to contract it. We insist, therefore, that, regardless of all other questions that may arise in this case, the commodity involved is interstate commerce, and this being so, the Public Utilities Commission of Ohio was and is without power to regulate the price at which the same shall be sold by this appellee to its vendee, the Portsmouth Gas Company.

Notwithstanding the fact that the appellants in their brief in the District Court declared that the natural gas involved in this proceeding to be interstate commerce, as shown by the quotation from that brief in the opinion of the District Court at pages 81 and following of the printed record, they now devote the greater part of their argument to an attempt to show that the declaration they then made and upon which the lower court acted, is not correct. It might be suggested that the appellants having invited the lower court to take the position which it did, they cannot now assume a contrary position. The elaborate attempt of of the appellants to show that the commerce involved here is not interstate and for that reason is subject to regula-

tion by the Public Utilities Commission of Ohio, resolves itself into several contentions:

1. That the pressure of the gas being reduced at the point of delivery to the Portsmouth Gas Company, its character as interstate commerce disappears;

2. That because this appellee is also engaged in distributing natural gas in the State of Ohio to another community, all of the business it does there is subject to public regulation;

3. Even though it be admitted that the transaction involved is interstate commerce, still the Public Utilities Commission of Ohio may regulate the rates to be charged because the Congress of the United States had not, at the time involved, prescribed any regulation therefor;

4. Because this appellee, in its answer before the Public Utilities Commission of Ohio, offered to permit the said Commission to have access to all of its books and records for any proper purpose, it submitted to the jurisdiction for all purposes and cannot now question the jurisdiction of the Commission to do anything it pleases.

We will discuss each of these propositions briefly.

It is argued that the pressure in the line through which the gas is delivered to the Portsmouth Gas Company must necessarily have been reduced because other gas was taken out of this line for delivery to another city. Of course, this court knows that under the law of physics the pressure in the line varies with the quantity of gas withdrawn therefrom, and even though no gas was ever taken out of this line except by the Portsmouth Gas Company, the pressure at the point of delivery would vary as the quantity taken from the line varied. The fact that more than one distributing system may be supplied from the same pipe line does not change the character of the commerce transported through that line. In the case of *Public*

Utilities Commission v. *Landon*, 249 U. S. 236, the natural gas was distributed from the pipe line there to a number of distributing companies along the line, and, of course, just as here, the pressure in the trunk line varied with the quantity of gas withdrawn therefrom; but this did not prevent the same from being characterized by this court as interstate commerce. In the case of *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, the court said that the natural gas became intrastate commerce when it was delivered into the distribution system and the pressure reduced by regulators from that maintained in the trunk line, to the pressure at which it was delivered to ultimate consumers. It is clear from a reading of that case that the change in pressure referred to by the court there meant the reduction of the pressure from that maintained in the trunk line, by means of regulators, to that maintained in the distribution lines. In other words, it was a breaking up of the bulk delivered in interstate commerce into appropriate units for sale to the ultimate consumer. This construction is made quite clear in the case of *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., supra.* It was there contended that because the pressure in the line was changed at the point of delivery, it ceased to be interstate commerce and, therefore, became subject to regulation by the State authorities. This court in that case held, in effect, that the change of pressure referred to was not variations in the trunk line pressure, but was that change in pressure which resulted from passing gas through regulators for the purpose of reducing it from the trunk line pressure of from 50 to 300 pounds to the delivery pressure to consumers of approximately 8 ounces, and held that notwithstanding the pressure was reduced at the point of delivery from one transmission line into another transmission line, this did not destroy the character of the substance as interstate commerce.

It is also urged that because this appellee furnishes gas to another municipality in the State of Ohio, in the performance of which service it is subject to regulation by the Public Utilities Commission, that all business done by it in that State becomes intrastate commerce and subject to regulation by the local authorities. It is true that this appellee distributes gas to the citizens of the City of Ironton, Ohio, and the village of New Boston in said State, and that the gas furnished to these two municipalities comes from the same supply line as that delivered to the Portsmouth Gas Company. It is difficult to see how the fact that this appellee is engaged in the distribution of natural gas in these municipalities can have any bearing upon the transaction with the Portsmouth Gas Company involved here. All of the gas passing through this transmission line is interstate commerce and remains interstate commerce, under the decisions of this court, until it is broken up and the pressure reduced so that it can be delivered to consumers in the quantities and under the circumstances appropriate to their use. Undoubtedly the gas delivered by this appellee to the Ironton and New Boston consumers is interstate commerce until the time it passes into the distribution lines in those municipalities, and just so, the gas delivered to the Portsmouth Gas Company is interstate commerce until it passes into the distribution lines and is properly treated for distribution to the consumers by the Portsmouth Gas Company. When this happens, this appellee is no longer interested in it.

The argument is also made that even though the transaction involved is interstate commerce, yet Congress not having regulated the same, the local authorities would have the power to do so. It is quite true that there are many holdings to the effect that where Congress has not acted in connection with a matter involving interstate commerce, the local authorities may make inconsequential regulations in regard thereto; but this court has uniformly

of natural gas for the City of Portsmouth and requiring this appellee to produce immediately before it evidence as to what this rate should be. If appellee carries out the order, it will require the expenditure of a large sum of money, averred in the bill (R. p. 10) to be at least the sum of $100,000.00, and this is not denied. If it refuses to carry out the order, it will subject itself to penalties, which, it is averred in the bill (R. p. 9), will be enforced against it and which amount to not less than $100.00 nor more than $1,000.00, and each day's failure shall constitute a separate offense. Under these circumstances, we respectfully submit that the court below properly took jurisdiction of the cause and granted the relief that it did.

It has been said by this court that the granting of an injunction is, to some extent at least, discretionary with the court of first instance. This discretion of the courts may be exercised as well to grant the injunctions as to refuse it.

Di Giovanni v. *Kansas Fire Ins. Co.*, 296 U. S. 64;

Petroleum Exploration Co. v. *Public Service Commission of Kentucky*, 304 U. S. 209.

The exercise of this jurisdiction will not be reviewed by an appellate court unless there has been clear abuse thereof. It surely cannot be said that the court here abused this discretion by granting the relief in a case where the complaining party had the alternative of expending more than $100,000.00 in compliance with the alleged invalid order, or submitting itself to the chances of penalties ranging from $100.00 to $1,000.00 a day by refusing to comply with it. Under such circumstances, we think it would have been a clear abuse of discretion had the court refused the relief which it granted. So we say that, irrespective of the Declaratory Judgment Act, the court,

in the exercise of its general equity jurisdiction, properly granted the relief which it did in this case.

The appellants argue that the court below did not have jurisdiction of the controversy here because there had been no final order. This is not a case in which there is any attempt to appeal from an order of an administrative body under statutory provisions, and the cases cited have no application. This case directly invokes the jurisdiction of the court to settle a controversy which has arisen between the parties, and is controlled by such cases as *Gulfy, Tax Collector*, v. *Interstate Natural Gas Co.*, 82 Fed. (2d) 145 (Certiorari denied, 298 U. S. 688); *Interstate Natural Gas Co.* v. *Louisiana Public Service Comm.*, 34 Fed. Sup. 980; and *Kentucky Natural Gas Corp.* v. *Public Service Comm. of Ky.*, 28 Fed. Sup. 509, affirmed in *Public Service Commission of Ky.* v. *Kentucky Natural Gas Corp.*, 119 Fed. (2d) 417.

THE FEDERAL POWER COMMISSION HAS THE SOLE POWER TO REGULATE THE TRANSACTIONS INVOLVED IN THIS PROCEEDING.

The Federal Natural Gas Act (Title 15, USCA, Sec. 717, etc.) confers upon the Federal Power Commission exclusive jurisdiction to regulate the rates charged for natural gas transported in interstate commerce. Section 717c requires the seller to file its rates with the Federal Power Commission, and forbids any change in these rates without the authority and approval of that Commission. This provision of the law has been complied with by this appellee, as appears from the order of the Federal Power Commission approving the same (R. p. 57). If it be contended that the Public Utilities Commission of Ohio can inquire into this rate and ascertain what in its judgment would be a proper rate, and require this appellee to

charge the same, it would be in the position of being required to charge a rate prescribed by the Public Utilities Commission of Ohio and inhibited by the Federal Power Commission, unless, perchance, the two Commissions should come to the same conclusion. The rate now in effect is already approved by the Federal Power Commission. Under the law, therefore, the Public Utilities Commission of Ohio could not prescribe any other rate, and any investigation or inquiry by it would be entirely futile.

It is contended, however, that the Federal Natural Gas Act not having been in effect when this appellee was brought into this proceeding, it can have no effect upon the jurisdiction of the Ohio Commission. It must be borne in mind that utility rates are prospective in their operation and that, even though it be admitted for the sake of the argument that the Public Utilities Commission of Ohio would have jurisdiction to regulate this rate in the absence of affirmative action on the part of the Congress of the United States, still that power could be taken away from it and would be taken away from it the very minute that Congress exercised its superior power over the transaction. Just as soon as the Natural Gas Act became effective, the Ohio Commission lost all power, if it ever had any, to regulate any transactions between this appellee and the Portsmouth Gas Company.

The appellants argue that in view of the fact that this proceeding before the Public Utilities Commission was instituted prior to the passage of the Natural Gas Act, it, (the Natural Gas Act) would have no pertinency in the consideration of the case; that the Federal Power Commission under the Natural Gas Act could make no order that would affect the rights of the parties arising before the passage of that Act. Assuming this to be true, it is just as true that the Public Utilities Commission of Ohio can make no order affecting rates such as are involved here retroactively. The only order that Com-

mission could make would be one fixing the rates for the future. In *Great Miami Valley Asso.* v. *Public Utilities Comm of Ohio*, 131 Ohio State 285, this exact question was before the Supreme Court of Ohio. In that case a complaint was made that certain rates charged were excessive. The Commission, after a hearing, found said rates to be excessive and prescribed a rate to be charged. The complainants insisted upon the Commission awarding reparation from the time the complaint was filed, but the Commission held that it had no power to afford any such relief, and on appeal to the Supreme Court of Ohio, the Commission was sustained in this regard. The law as disclosed by the Supreme Court of Ohio in that case must control any action the Commission might take in this case. All that Commission could do would be to prescribe a rate for the future, and inasmuch as the Natural Gas Act has come into effect before it prescribed any such rate, its power to do so is now entirely gone. The only tribunal that could fix any rate is the Federal Power Commission.

The jurisdiction of the Federal Power Commission to regulate rates such as are involved here, sufficiently appears from the cases of *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, decided by this court on March 16, 1942, 86 L. Ed. 699, and *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, decided by this court on January 5, 1942, 86 L. Ed. 322.

On the whole case, we respectfully submit that the judgment of the lower court is correct and should be affirmed.

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